IN THE

Supreme Court of the United States

October Term, 1990

DAN COHEN,

Petitioner,

v.

COWLES MEDIA COMPANY, a corporation d/b/a Minneapolis Star and Tribune Company and NORTHWEST PUBLICATIONS, INC., a corporation,

Respondents.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF MINNESOTA

BRIEF OF RESPONDENT COWLES MEDIA COMPANY

JOHN D. FRENCH
JAMES FITZMAURICE
JOHN BORGER*
Faegre & Benson
2200 Norwest Center
90 South Seventh Street
Minneapolis, MN 55402-3901
(612) 336-3000
Attorneys for Respondent Cowles Media Company
*Counsel of Record

Of Counsel:
RANDY M. LEBEDOFF
425 Portland Avenue South
Minneapolis, MN 55488
(612) 672-4000

[illegible] Printing Co., [illegible] St., St. Paul, Minn. [illegible] — [illegible]

QUESTIONS PRESENTED

Petitioner, in formulating the Question Presented, fails to acknowledge that the Minnesota Supreme Court found, as a matter of Minnesota state law, that agreements between reporters and sources are not legally binding contracts. He also overstates the role of the First Amendment in that court's discussion of promissory estoppel, which—though it is the sole basis for review by this Court—was never asserted by petitioner in any of the lower courts.

Accordingly, the Questions Presented are:

1. Whether this Court is properly presented with a federal question for review by the Minnesota Supreme Court's discussion of promissory estoppel and the First Amendment, when the state-law doctrine of promissory estoppel was not properly presented to the lower court and was not necessary to its judgment.

2. If so, whether the Minnesota Supreme Court properly gave weight to First Amendment considerations where petitioner sought to hold the newspapers liable for publishing true facts about matters of public significance in the context of an election campaign.

LIST OF PARTIES

The parties to the proceeding below were the petitioner Dan Cohen, respondent Cowles Media Company, publisher of the *Minneapolis Star and Tribune* (hereinafter "Star Tribune"), and respondent Northwest Publications, Inc.

Cowles Media Company has no parent company and has no subsidiaries other than wholly owned subsidiaries.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

IN THE

Supreme Court of the United States

October Term, 1990

No. 90-634

DAN COHEN,

Petitioner,

v.

COWLES MEDIA COMPANY, a corporation d/b/a Minneapolis Star and Tribune Company and NORTHWEST PUBLICATIONS, INC., a corporation,

Respondents.

ON WRIT OF CERTIORARI TO
THE SUPREME COURT OF MINNESOTA

BRIEF OF RESPONDENT COWLES MEDIA COMPANY

STATEMENT OF THE CASE

A. Introduction.

Petitioner Dan Cohen brought this action against two newspapers to recover compensatory and punitive damages for breach of contract and fraudulent misrepresentation based upon their public disclosure of petitioner as the source of information concerning old misdemeanor convictions of a candidate for lieutenant governor. Cohen, working as a public relations representative for one gubernatorial campaign, hoped that disclosing this information would damage the opposition's chances in the election. The newspapers accurately identified Cohen as the source of this information because they considered his activities to be at least as newsworthy as the information about the candidate. Cohen had obtained a promise of confidentiality from the newspapers' reporters before he gave them the information.

A jury awarded Cohen a total of $700,000 on his two theories of breach of contract and of misrepresentation. Both appellate courts overturned the misrepresentation verdict and $500,000 punitive damages award because the facts of the case did not support a fraud claim under Minnesota law (A-6-7; A-39-42). The Minnesota Supreme Court overturned the contract award, again under Minnesota state law, on the ground that the law "does not create a contract where the parties intended none" (A-9), thereby setting aside the jury's award of $200,000 compensatory damages.

This Court granted certiorari, limited to petitioner's first question concerning the role of the First Amendment in this case. The Minnesota Supreme Court mentioned the First Amendment only in its discussion of a possible theory of promissory estoppel—a theory which was not presented at

trial, which was not briefed on appeal, and which "surfaced" (A-11 n.5) only obliquely at the end of oral argument in the Minnesota Supreme Court. The Minnesota Supreme Court expressly did not "consider First Amendment implications" in its resolution of Cohen's claim for breach of contract (A-13).

B. Factual Background.

Six days before the 1982 gubernatorial election between Republican Wheelock Whitney and Democrat Rudy Perpich, five Whitney supporters met in the campaign's headquarters in Minneapolis to consider a tactic for bolstering the badly trailing Whitney campaign. All five men had extensive experience in political campaigns and three had been elected to public office (R. 140-41). One of these men (a former legislator and former county attorney) had obtained criminal records showing that Marlene Johnson, the Democratic candidate for lieutenant governor, had been convicted twelve years earlier on two minor criminal counts of shoplifting and unlawful assembly.[1] It was decided that another of these men, petitioner Dan Cohen (a former city council president), would deliver these documents to reporters for the Minneapolis and St. Paul newspapers, the Associated Press, and WCCO-TV (R. 148-49).

At the Capitol press room, Cohen approached *Minneapolis Tribune* reporter Lori Sturdevant and said: "I have some documents which may or may not relate to a candidate in the upcoming election, and if you will give me a promise of confidentiality, that is that I will be treated as an anonymous

[1] Dissenting Minnesota Supreme Court Justice Yetka, although strongly critical of the newspapers for breaking their promises to Cohen, characterized the information which Cohen provided about Johnson as "rather trivial infractions" (A-15).

source, that my name will not appear in any material in connection with this, and you will also agree that you're not going to pursue with me a question of who my source is, then I'll furnish you with the documents" (R. 155). Sturdevant agreed (R. 156), and Cohen gave her the documents and talked with her about their contents (R. 157). Cohen crossed the hall to the office of *St. Paul Dispatch* reporter Bill Salisbury, where a similar exchange occurred (R. 163-69). By the time Cohen approached AP reporter Gary Nelson, it was obvious that he was providing information to a number of different reporters (R. 398). Again, Cohen provided documents after Nelson agreed to treat him as an anonymous source (R. 172-73). After some work in his own office, Cohen met for lunch with WCCO-TV reporter Dave Nimmer, and "rather quickly" went through the same routine with him (R. 176-77).

The four news organizations treated the story differently. The Associated Press described the contents of court records concerning Marlene Johnson which "were slipped to reporters Wednesday," but did not identify Cohen (JA-11). Nimmer recommended that WCCO-TV "throw the story away. It was no story" (R. 491), because "I didn't believe it was fair to the campaign. I thought it was silly" (R. 504). The Minneapolis and St. Paul papers published both parts of the story: the contents of the court records concerning Marlene Johnson, and Dan Cohen's role in disseminating that information (JA-1-10).

Before publishing the story, the Star Tribune investigated it at length. Assistant City Editor Roger Buoen learned of the records from Sturdevant and sent another reporter to St. Paul to locate the original records (R. 341). Reporter David Anderson went to the dead storage area of the record center and examined not only the records themselves, but also the

sign-out sheet, which showed that the last person to see the records before Anderson was Whitney supporter Gary Flakne; Flakne had checked the records the day before, and the last person before that had been years earlier (R. 1572-74). Anderson called Flakne, who revealed the very information that Cohen was attempting to keep secret: Flakne told Anderson that "I did it for Dan Cohen" (R. 1607; *see also* R. 324-26; *but see* R. 1595-97). Whitney's campaign manager, who had learned of Cohen's role from one of Cohen's colleagues (R. 737, 739), also identified Cohen as the source of the Johnson information (JA-2). Reporters got reactions from both the Democratic and Republican campaigns. In all, four or five reporters contributed to the story (R. 1636).

The subject of the still-unwritten story came before about 15 editors (R. 1471) at the Star Tribune news huddle beginning about 3:30 or 4:00 p.m.; the story was "a subject of vigorous debate at the huddle," which lasted past 5:00 p.m. (R. 1306-08). Some editors took the position that the Johnson information was not newsworthy at all; others took the position that the fact that a Whitney ally had leaked the information was at least as important as the information itself and the two items should be treated equally; some took the position that the promise of confidentiality had to be protected at all costs; some said a connection should be made to the Whitney campaign without identifying the individual. Managing editor Frank Wright presided over the huddle and listened to the debate, but stated no position of his own except that Star Tribune should thoroughly investigate the story itself (R. 1308, 1313-14, 1469-72). The huddle ended with the matter still unresolved (R. 1307-08, 1469-72). Sturdevant called Cohen to ask whether he would withdraw his request for confidentiality; he refused (R. 455-57, 1144-45).

About 9:00 or 9:30 that evening, assistant managing editor Mike Finney, with the approval of managing editor Frank Wright, made the final decision to publish the story using Cohen's name (R. 450-51, 1142-43, 1148, 1473). This was only an hour or so before the paper had to go to press (R. 1302). The editors considered and then rejected a variety of options. The option of not running the story at all was rejected because the information about Johnson was newsworthy (R. 1309, 1311). Moreover, the editors were aware that several other news organizations had the story, and if the other media published the information and the Star Tribune did not, then the Star Tribune would be accused of covering up for the Perpich campaign (R. 1310-11, 1475-76).

The editors also rejected the option of running a story about Johnson's records without disclosing the source of the records. The source of the information was considered to be at least as newsworthy as the information about Ms. Johnson R. 1639, 1309-10). In the Associated Press story, Ms. Johnson accused the Whitney campaign of "a last-minute smear" and the Whitney campaign denied any involvement, which left the reader hanging (R. 1312-13). A veiled reference to "a Whitney ally" or a "Whitney supporter" was similarly an unsatisfactory alternative because it would have left many people open to possible suspicion and would have left the readers unsure of the source's real relationship to the campaign; the best way to deal with the situation was to be specific (R. 1150-52, 1488; *see also* R. 1405-06). Furthermore, Cohen's role in distributing the records was becoming more and more widely known, and Star Tribune reporters were able to obtain that information from other sources who had made no promise of confidentiality (R. 1639-41). In Finney's judgment, this spreading knowledge "really voided the commitment that we had made earlier to Mr. Cohen" (R. 1640).

Sturdevant disagreed with the decision and asked that her name be taken off the story, which was done (R. 452). Over the following years, thoughtful editors and reporters around the country have reached a variety of conclusions about whether Cohen should have been identified (R. 499).

Cohen's employment with Martin-Williams, Inc., an advertising agency, ended the day the articles appeared. Trial testimony conflicted as to whether Cohen resigned (R. 1504; testimony of Cohen's supervisor, David Floren) or was fired (R. 201; testimony of Cohen).

C. Procedural Background.

Cohen commenced this action against the Minneapolis and St. Paul newspapers in December 1982, alleging breach of contract and misrepresentation. Following discovery, the newspapers moved for summary judgment, arguing among other grounds that the First Amendment protected their editorial decisions. The trial court denied that motion on June 19, 1987 (A-77).

Trial began July 5, 1988. The trial court refused to allow defendant's attorneys to argue that the newspapers' publications were protected by the First Amendment, yet it allowed plaintiff's counsel to tell the jury that the court had rejected the newspapers' First Amendment defenses (R. 1784). On July 22, 1988, the jury returned a verdict against the newspapers for breach of contract and fraudulent misrepresentation. The jury awarded plaintiff $200,000 compensatory damages as well as $250,000 in punitive damages against each defendant (A-70). The trial court denied defendants' various post-trial motions on November 18, 1988 (A-61).

On appeal, the Minnesota Court of Appeals unanimously set aside the award of punitive damages, after examining the evidence and finding as a matter of law that there "was no

evidence of material misrepresentations or omissions" to support the jury verdict of fraudulent misrepresentation (A-41). In that September 5, 1989 decision, a two-to-one majority of the Court of Appeals affirmed the $200,000 compensatory award for breach of contract (A-19). In dissent, Judge Crippen criticized the majority's decision as "out of sync with settled first amendment principles. No authority, direct or by remote analogy, permits an award of damages for publishing political material, and justifies this as an application of state common law not even slightly limited in deference to the first amendment" (A-46).

All parties appealed to the Minnesota Supreme Court. On July 20, 1990, that court unanimously affirmed the reversal of the misrepresentation verdict and punitive damages award (A-6-7, 14, 17) and, by a four-to-two majority, reversed the award of compensatory damages for breach of contract. The majority concluded that a contract cause of action was inappropriate in the journalist-source relationship, because reporters and their sources do not ordinarily believe they are making legally binding contracts and because a contract cause of action would be too rigid to permit proper consideration of all of the special circumstances in this situation (A-7-10).

Cohen's petition for certiorari invoked the First Amendment and the Contract Clause. On December 10, 1990, this Court granted certiorari on the First Amendment issue only.

SUMMARY OF ARGUMENT

Noticeably absent from Petitioner's Brief is any statement of his theory of recovery after the Minnesota Supreme Court's disposition of his contract claim on state-law grounds. In asking that "the judgment of the Minnesota Court of Appeals be affirmed," Petitioner's Brief at 31, petitioner asks for a legal impossibility; that judgment upheld only petitioner's claim

for breach of contract, which is not before this Court. Petitioner's Brief thus proceeds from a fundamentally defective view of the federal issue actually before this Court.

I. This petition presents an awkward and inappropriate vehicle for this Court to address the First Amendment issues asserted by petitioner. Petitioner lost his jury award on purely state-law grounds, when the Minnesota Supreme Court reversed the judgments of breach of contract and misrepresentation. The Minnesota Supreme Court discussed the First Amendment only in the context of a theory of promissory estoppel which petitioner himself had never raised. Its discussion of promissory estoppel did not affect the judgment of the Minnesota Supreme Court in any way. Consequently, the references to the First Amendment in the decision below are dicta, and provide dubious grounds for this Court's jurisdiction in this case. Furthermore, to allow petitioner to proceed anew on a promissory estoppel claim which he never asserted, either at trial or on appeal, would violate long-established rules of appellate practice and procedure and would deny respondents due process of law.

II. Judicial scrutiny of relationships between journalists and their sources requires some measure of First Amendment sensitivity. The present case directly affects respondents' First Amendment rights to gather the news, to exercise editorial discretion in deciding what news to publish or not publish, and to communicate truthful information about the conduct of political campaigns. In this context, the Minnesota Supreme Court's approach of using promissory estoppel on a case-by-case basis to balance the journalists' First Amendment rights against the source's interest in confidentiality/anonymity is the minimum consideration which the Constitution provides to respondents. The state court struck this particular balance against petitioner and his state-protected in-

terests. This Court has no reason to adjust that balance, because that would not change the result below.

Furthermore, in the particular factual circumstances of this case, this Court's prior decisions provide a broader First Amendment analysis for affirming the conclusion of the Minnesota Supreme Court. Because the respondent newspapers published truthful information about a matter of public significance, they cannot be punished for that publication unless there is, at the very least, "a need to further a state interest of the highest order." *The Florida Star v. B.J.F.*, 491 U.S. 524, ——, 58 U.S.L.W. 4816, 4818 (1990). Petitioner's asserted interest in anonymity does not rise to that level.

ARGUMENT

Point I

THIS COURT SHOULD DISMISS THE WRIT OF CERTIORARI FOR WANT OF JURISDICTION.

Petitioner Cohen tried his case and obtained a jury verdict on his two theories of misrepresentation and breach of contract (A-72-77). The Minnesota Supreme Court reversed the misrepresentation finding and the punitive damages award because the record showed that, at the time Cohen was promised confidentiality, neither the reporters nor the editors intended to reveal his identity (A-6-7). The court reversed the contract award because, as a matter of Minnesota contract law, the court was "not persuaded that in the special milieu of media newsgathering a source and a reporter ordinarily believe they are engaged in making a legally binding contract" (A-9). Neither ruling involved any consideration of the First Amendment, as the court expressly stated (A-12-13). The reversal of petitioner's entire judgment thus rests entirely upon state grounds.

The Minnesota Supreme Court did invoke the First Amendment in its discussion in dicta of the possible application of a theory of promissory estoppel, in Part III of its decision (A-10-14). Cohen never advanced this theory at trial or on appeal. The Minnesota Supreme Court observed that this theory "surfaced during oral argument" (A-11 n.5), but even that was not at Cohen's urging and not in the form ultimately discussed in the majority opinion.[2]

The procedural context in which the Minnesota Supreme Court considered the public policy and First Amendment implications of the present situation makes it both unnecessary and inappropriate for this Court to address the federal issue. Although "it is irrelevant to inquire when a federal question was raised in a court below when it appears that such question was actually considered and decided," *Orr v. Orr*, 440 U.S. 268, 274-75 (1979), this Court has emphasized that it "reviews judgments, not statements in opinions," *Black v. Cutter Laboratories*, 351 U.S. 292, 297 (1956). The judgment of the Minnesota Supreme Court, reversing Cohen's recovery on contract and misrepresentation claims, rested on state grounds

---

[2] During rebuttal argument, Justice Yetka first questioned

> whether if there had been even a practice, a custom in the trade—that there could be an equitable estoppel of some kind to protect people who gave this information to a newspaper reporter with every indication that it was never going to be used, that the source would never be used. Now, that's a little different than an outright contract, but there are equitable estoppel cases, and *it hasn't even been discussed.*

(JA-38) (emphasis added). As developed in the majority opinion, however, promissory estoppel could arise not from general industry practice, but only from a particular unambiguous promise made by one particular individual to another (A-10-11).

entirely; the court's discussion of a possible theory of promissory estoppel was pure dicta that did not affect that judgment. The judgment reversing the jury verdicts, therefore, neither rests primarily on federal law nor is it interwoven with federal law; indeed, the judgment does not even refer to federal law. Accordingly, the judgment rests entirely upon adequate and independent state grounds, and this Court should dismiss the petition for want of federal jurisdiction. *See Michigan v. Long*, 463 U.S. 1032, 1040 (1983).

The Minnesota Supreme Court's discussion of promissory estoppel simply constitutes a framework for future litigation of any similar problems in Minnesota and a warning to the press that there "may be instances where a confidential source would be entitled to a remedy such as promissory estoppel, when [Minnesota's] interest in enforcing the promise to the source outweighs First Amendment considerations" (A-14). The opinion certainly does not "grant newspapers immunity from liability for damages caused by dishonoring promises of confidentiality given in exchange for information on a political candidate" (Petitioner's Brief at i). It is an intentionally and carefully limited conclusion, set in a discrete factual context (A-14).

In invoking First Amendment considerations, the Minnesota Supreme Court did not cite any particular decision of this Court. Instead, it spoke of the First Amendment as a sort of shorthand for the general public interest in receiving information about political campaigns—an interest just as much to be found in state law as in federal law. *E.g., Friedell v. Blakely Printing Co.*, 163 Minn. 226, 203 N.W. 974 (1925); *Marks v. Baker*, 28 Minn. 162, 9 N.W. 678 (1881); JA-32 (transcript of oral argument; questions by Wahl, J.).

To grant petitioner any measure of relief at this stage on a theory of promissory estoppel would violate longstanding principles of both this Court and the Minnesota Supreme Court. In Minnesota, as in most jurisdictions, "[a]s a general rule, litigants are bound on appeal by the theory or theories, however erroneous or imprudent, upon which the case was actually tried." *Johnson v. Jensen*, 446 N.W.2d 664, 665 (Minn. 1989). The Minnesota Supreme Court surely would not have departed from this rule to grant petitioner recovery on a promissory estoppel theory which he had not raised at trial.[3]

This Court likewise follows the rule that, after bringing and trying a case on one theory, the plaintiff on appeal cannot be permitted to change to another which the defendant was not required to meet below. *Virginian R.R. v. Mullens*, 271 U.S. 220, 227-28 (1926). Although this rule generally is stated as a matter of appellate practice and procedure, it carries constitutional overtones. Allowing petitioner to recover compensatory damages on a claim which he never advanced or proved in the lower courts, even though the Minnesota Supreme Court chose to discuss the theory of promissory estop-

[3] In numerous cases, Minnesota appellate courts have refused to consider various theories of estoppel, including promissory estoppel (even where plaintiff had asserted a breach of contract claim below), which a party attempted to raise for the first time on appeal. *E.g., Flooring Removal, Inc. v. Ryerson*, 447 N.W.2d 429, 430 (Minn. 1989) (further stating that "the court of appeals erred in identifying and then deciding this issue"); *W.H. Barber Co. v. McNamara-Vivant Contracting Co.*, 293 N.W.2d 351, 357 (Minn. 1979); *Haugland v. Canton*, 250 Minn. 245, 251-52, 84 N.W.2d 274, 279 (1957); *Annis v. Annis*, 250 Minn. 256, 263, 84 N.W.2d 256, 261 (1957); *Barnard-Curtiss Co. v. Minneapolis Dredging Co.*, 200 Minn. 327, 331, 274 N.W. 229, 232 (1937); *Park-Lake Car Wash, Inc. v. Springer*, 394 N.W.2d 505, 518 (Minn. Ct. App. 1986).

pel in a manner which did not affect the outcome of the appeal below, would deny respondents due process of law. *See West Ohio Gas Co. v. Public Utilities Comm'n*, 294 U.S. 63, 77 (1935) ("To put into the case now an issue heretofore kept out of it and thereby reach another [result] would be a denial of a full and fair hearing by the tribunals of the state, a denial forbidden by the Constitution of the nation."); *Peck v. Heurich*, 167 U.S. 624, 629 (1897) ("A judgment cannot be affirmed upon a ground not taken at trial, unless it is made clear beyond doubt that this could not prejudice the rights of the [opposing party].").[4]

The Minnesota Supreme Court's discussion of promissory estoppel had no effect on the actual judgment below. This Court's consideration of the First Amendment implications of such a promissory estoppel remedy for confidential sources can be left for another day, when a plaintiff has actually presented and litigated a claim for such a remedy. Because the only question for which this Court granted certiorari is one not *properly* raised, litigated, or passed upon below, this Court now should dismiss the petition for want of jurisdiction, *McCullough v. Kammerer Corp.*, 323 U.S. 327 (1945), or as improvidently granted, *Iowa Beef Packers, Inc. v. Thompson*, 405 U.S. 228 (1972).

---

[4] Because of the manner in which the theory "surfaced" in this case, respondents had no opportunity to address certain defenses relevant only in the context of a promissory estoppel claim. For example, the reporters at most were agents for the respondent newspapers, and even their agency status was a question of fact for the jury under the theories presented to the trial court (A-81-85). Under Minnesota law, "[e]stoppel cannot be posted on the claimed actions of an agent." *Froelich v. Aspenal, Inc.*, 361 N.W.2d 37, 39 (Minn. Ct. App. 1985).

Point II

ANY STATE LAW REMEDY FOR INJURIES ARISING FROM THE PUBLICATION OF TRUTHFUL INFORMATION ABOUT MATTERS OF PUBLIC SIGNIFICANCE MUST TAKE FIRST AMENDMENT PRINCIPLES INTO ACCOUNT.

A. The First Amendment Affects Any Analysis of Legal Liability in the Present Circumstances.

In addressing the substantive issue presented by the writ, petitioner in effect requests this Court to regulate journalistic ethics in newsgathering without considering First Amendment principles. This Court should reject that request.

In seeking confidentiality from the reporters, Cohen sought to keep the Minnesota electorate ignorant of certain information which he believed could hurt the Whitney campaign while revealing information which could hurt the Perpich-Johnson campaign. Cohen's group carefully chose both the manner and conditions of transferring the information about candidate Johnson to the reporters, with the twin purposes of heightening the damage to the Perpich-Johnson campaign and minimizing the risks of backlash against the Whitney campaign. The court records could have been mailed or delivered anonymously to the news organizations; instead, Cohen's group decided that personal delivery would lend the information "more credibility" (R. 597-98, 725-28). Cohen voluntarily transmitted the information to several news organizations to increase the odds that someone would publish the information, (*see* R. 5980); this necessarily would increase the competitive pressures for others to publish the information. That effort, at least, succeeded; however loudly Cohen's attorney and wit-

nesses proclaimed at trial that the defendants should have honored their reporters' agreement on confidentiality by simply withholding the entire story, that option effectively had been foreclosed by the release of the Associated Press story. Star Tribune concluded that it could not ignore the story without being accused of a cover-up to protect the Perpich-Johnson campaign, which it had endorsed just a few days earlier (R. 1310-11, 1475-76).

Cohen's strategy failed, however, in its further objective to manipulate the thrust of the news coverage. Cohen wanted to keep his role in releasing the information confidential so that the focus of the story would be on Johnson's court record (R. 357), and to avoid public backlash against the Whitney campaign (R. 378). The editors decided that the public was entitled to both parts of the story, and identified Cohen as the source (R. 1234, 1309-10, 1314-16, 1382-84, 1473, 1636-39). Cohen's lawsuit amounts to a complaint that he was unable to attack Johnson while shielded by anonymity.

Petitioner managed to convince the trial court that the case had "no constitutional dimension" (A-88). This Court, however, must surely disagree. The proceedings in the trial court restricted press freedoms: by importing contract theory into the relationships between reporters and their sources, thereby placing artificial limits upon the newsgathering process which neither reporters nor sources ever anticipated; by allowing courts to interpret contracts and to second-guess editorial decisions of what and when to publish or to withhold information; and by allowing recovery of damages for the publication of accurate information about a political campaign. The First Amendment protects each of these press activities: news-

gathering, *Branzburg v. Hayes*, 408 U.S. 665, 681 (1972); editorial discretion, *Miami Herald Publishing Co. v. Tornillo*, 418 U.S. 241, 258 (1974); and publication of truthful information, *Smith v. Daily Mail Publishing Co.*, 443 U.S. 97, 102 (1979), particularly information about political campaigns and the process of self-government, where debate should be "uninhibited, robust and wide-open," *New York Times Co. v. Sullivan*, 376 U.S. 254, 270 (1964). Governmental interference with constitutional rights through court enforcement of common law rules constitutes state action, *New York Times Co. v. Sullivan*, 376 U.S. at 265, even in the context of enforcing private contracts, *Railway Employees' Dept. v. Hanson*, 351 U.S. 225, 232 n.4 (1956); *Barrows v. Jackson*, 346 U.S. 249, 253-54 (1953).

In this setting, the First Amendment necessarily plays *some* role. Petitioner's argument to the contrary rests upon two premises: that by promising confidentiality, the newspaper reporters waived any First Amendment protections, and that by breaking those promises the newspapers engaged in wrongful behavior which deprives them of any First Amendment rights. Both points are mistaken.

(1) Waiver is Not an Issue in This Case.

Waiver is not an issue under the promissory estoppel approach taken by the Minnesota Supreme Court. The doctrine of promissory estoppel requires courts to consider numerous factors in determining whether "injustice can be avoided only by enforcing the promise" (A-10). Some of those factors, such as the public's interest in receiving information about political campaigns, would not be susceptible to waiver by journalists.

Even if the press were knowingly and voluntarily to agree to forego its own rights, the voluntariness of that agreement would be only one factor in the Minnesota Supreme Court's equitable balancing, rather than the bright-line determinant used by the Minnesota Court of Appeals (A-13) ("In deciding whether it would be unjust not to enforce the promise, the court must necessarily weigh the same considerations that are weighed for whether the First Amendment has been violated.").

Petitioner's Brief at 20-22 fails to recognize this point, and complains that the Minnesota Supreme Court failed to address the waiver issue. Because the waiver argument does not apply to the promissory estoppel theory which is the sole basis for review by this Court, it should not be necessary to address it at length here. Briefly, however, Star Tribune notes two responses to petitioner's waiver argument. First, Cohen neither raised nor offered evidence on this point at trial; he raised it for the first time at pages 43-46 of his brief to the Minnesota Court of Appeals. This issue therefore is not properly before this Court. *See* pp. 13-14 above. Second, the reporters' promises do not meet the standard for waiver of constitutional rights, namely, "an intentional relinquishment or abandonment of a known right or privilege" made "with full awareness of the legal consequences." *D.H. Overmyer Co., Inc. v. Frick Co.*, 405 U.S. 174, 185-86, 187 (1972). The Minnesota Supreme Court recognized that reporters and sources do not ordinarily believe they are engaged in making a legally binding contract (A-9). In that context, it cannot seriously be argued that journalists knowingly abandoned their constitutional defenses

to unforeseen litigation arising from a nonexistent contract. *See also* A-55-58 (Minn. Ct. App.; Crippen, J., dissenting).

(2) Ethical Standards Do Not Establish Legal Remedies.

Petitioner's "bad conduct" argument likewise is insufficient to deny respondents any and all First Amendment protection. Petitioner contends that he should recover damages because, by publishing information about him, the newspapers broke their promises to him. The Appellate Division of the New York Supreme Court rejected a similar argument in *Virelli v. Goodson-Todman Enterprises, Ltd.*, 142 A.D.2d 479, 536 N.Y.S.2d 571 (N.Y. App. Div. 1989), *appeal after remand*, 159 A.D.2d 23, 558 N.Y.S.2d 314 (1990), stating: "We see no reason why these [constitutional] principles should not apply equally where, as here, the only aspect of plaintiffs' claim distinguishing it from defamation and invasion of privacy is the alleged breach of [the reporter's] promise to self-censor the content of the article so that plaintiffs' identities would remain confidential." 142 A.D.2d at 487, 536 N.Y.S.2d at 576. This Court observed in *Hustler Magazine, Inc. v. Falwell*, 485 U.S. 46 (1988), that:

> in the world of debate about public affairs, many things done with motives that are less than admirable are protected by the First Amendment. . . . Thus while . . . a bad motive may be deemed controlling for purposes of tort liability in other areas of the law, we think the First Amendment prohibits such a result in the area of public debate about public figures. (*Id.* at 53.)

In a parallel argument, petitioner implies that he should recover damages because some other journalists criticized re-

spondents for their decision to disclose his name. Petition at 6-7. Petitioner improperly confuses ethics with legal liability. The Minnesota Supreme Court made no such error:

> The question before us . . . is not whether keeping a confidential promise is ethically required but whether it is legally enforceable; whether, in other words, the law should superimpose a legal obligation on a moral and ethical obligation. The two obligations are not always coextensive. (A-8.)

The Associated Press made a different editorial choice than did respondents in the very same factual situation, yet in its amicus curiae brief urged the court below not to subject good faith exercises of editorial discretion to judicial scrutiny.

Decisions about newsgathering techniques and editorial content should remain primarily with journalists themselves. Journalists constantly must make decisions, under severe time constraints, about what information should be published and about how to obtain and to present the information. Their paramount objective is to inform the public. A pledge of confidentiality to a source should be neither sought nor granted lightly, for it can deprive the news-consuming public of significant, truthful information. Yet the discriminating use of confidential sources is an important and necessary tool for the press to acquire other significant, truthful information. The use of confidential sources requires journalists to make these trade-offs in what they perceive to be the interests of their readers, and not every journalist will agree with every choice. Courts should continue to avoid this professional debate. Judicial intervention in matters of professional standards would be counter-productive as well as unwarranted, because transforming ethical standards into legal rules would

create a disincentive for the press to set lofty standards for itself.

Star Tribune's editors did not lightly decide to identify Cohen as the source of the Marlene Johnson information in spite of reporter Sturdevant's promise. They considered several alternatives, and chose the course which they believed best served their readers. Their decision can be and has been debated, second-guessed, and criticized. In the final analysis, however, as respondents' expert witness David Lawrence, Jr., publisher and chairman of the Detroit Free Press, testified: "My personal definition of good journalism suggests that the stories that ran were reasonable and with honor" (R. 1399).

Courts should not accept legal theories which raise the interests of the source to the extent that they substantially interfere with the exercise of the newspapers' best judgments on how to inform their readers. As Judge Crippen wrote in dissent in the Minnesota Court of Appeals:

> When the state determines through civil lawsuits what constitutes a contract, when a breach occurs, and which special circumstances permit disregard of the promise, it usurps editorial decision-making and chills exercise of press freedom. In addition, this regulation inevitably shapes the decision about when the promise is appropriately used. It is for editors, not the courts, to decide when promises on content should be made and to decide when publication is important. (A-48-49.)

Journalists' own sense of honor and of professionalism provides more protection to sources than would any judicial remedy. The press has a long tradition of protecting confidential sources. Marcus, *The Reporter's Privilege: An Analysis of the Common Law*, Branzburg v. Hayes, *and Recent*

Statutory Developments, 25 Ariz. L. Rev. 815, 817 (1983) (tracing issue to John Peter Zenger in 1734). Indeed, journalists' own sense of professional responsibility has been demonstrably more effective in protecting their confidential sources than court-imposed fines and even jail sentences have been in forcing journalists to reveal their sources. *See, e.g.*, R. 698; *In re Grand Jury Proceedings Storer Communications v. Giovan*, 810 F.2d 580, 583 (6th Cir. 1987); *Farr v. Pitchess*, 522 F.2d 464 (9th Cir. 1976), *cert. denied*, 427 U.S. 912 (1975); *In re Farber*, 394 A.2d 330 (N.J. 1978), *cert. denied*, 439 U.S. 997 (1978). Furthermore, when reporters, editors and newspapers violate pledges of confidentiality, they will face criticism from fellow professionals and skepticism from potential sources, as this incident has shown (R. 424, 452). All of these factors make journalists unwilling to violate promises made to their sources, except in very rare instances.

Sometimes, however, journalists reluctantly will conclude that they must break a promise to a source in order to fulfill their obligation to their readers, as in Newsweek's decision to identify Oliver North as the source of leaks which North publicly had attributed to congressional sources (A-8 n.4). Because of the constitutional interest in allowing the widest possible discretion for journalistic judgments, this is an area best left to moral and ethical considerations, and to practical consequences, rather than to judicial determinations. Langley & Levine, *Broken Promises*, Columbia Journalism Review 21 at 24, July/August 1988; Note, *Breach of Confidence: An Emerging Tort*, 82 Colum. L. Rev. 1426, 1460-62 (1982).

This Court's prior decisions demonstrate its reluctance to limit First Amendment freedoms by transforming standards of ethics or fairness into tests of legal liability. In *Miami*

Herald Publishing Co. v. Tornillo, 418 U.S. 241 (1974), the Court noted:

> The choice of material to go into a newspaper, and the decisions made as to limitations on the size and content of the paper, and treatment of public issues and public officials—*whether fair or unfair*—constitute the exercise of editorial control and judgment. It has yet to be demonstrated how governmental regulation of this crucial process can be exercised consistent with First Amendment guarantees of a free press as they have evolved to this time. (*Id.* at 258; emphasis added.)

In short, "regardless of how beneficent-sounding the purposes of controlling the press might be, we . . . remain intensely skeptical about those measures that would allow government to insinuate itself into the editorial rooms of this Nation's press." *Nebraska Press Ass'n v. Stuart*, 427 U.S. 539, 560-61 (1976) (quoting Miami Herald, 418 U.S. at 259 (White, J., concurring)).[5]

---

[5] There are numerous similar pronouncements. In *Cox Broadcasting*, involving the publication of the name of a rape victim, the Court stressed: "In this instance as in others reliance must rest upon the judgment of those who decide what to publish or broadcast." 420 U.S. at 496. In *Houchins v. KQED, Inc.*, 438 U.S. 1 (1978), the Court observed: "The government cannot restrain communications of whatever information the media acquires—and which they *elect* to reveal." *Id.* at 10 (emphasis added). In *The Florida Star v. B.J.F.*, 491 U.S. 524, 57 U.S.L.W. 4816 (1989), the fact that a newspaper published a rape victim's full name in violation of its own internal policy of not publishing the names of sexual offense victims, *id.* at ——, 58 U.S.L.W. at 4817, had no bearing on this Court's analysis of the constitutional issues. In *Harte-Hanks Communications, Inc. v. Connaughton*, 491 U.S. 657, ——, 57 U.S.L.W. 4846, 4849 (1989), the Court emphasized its rejection of a "professional standards rule [in public figure defamation cases], which never commanded a majority of this Court."

B. This Court Has No Reason to Readjust The Minnesota Supreme Court's Balancing of the Interests Involved in This Case.

Recognizing any role whatsoever for the First Amendment in this case is enough to affirm the conclusion of the Minnesota Supreme Court. The Minnesota Supreme Court's analysis under promissory estoppel considers all of the reasons why the promise was not kept (A-11) and amounts to a case-by-case balancing of all of the interests involved: "The court must balance the constitutional rights of a free press against the common law interest in protecting a promise of anonymity" (A-13). The Minnesota Supreme Court clearly disapproved of the contract theory advanced by petitioner and accepted by the lower courts because that theory "put[] an unwarranted legal rigidity on a special ethical relationship, precluding necessary consideration of factors underlying that ethical relationship" (A-10).

In this case, the court placed considerable importance on the public policies (embodied in the First Amendment as well as in state law) which favor the free flow of information about election campaigns (A-13). The court gave comparatively little weight, in these particular circumstances, to petitioner's interest in obtaining anonymity in order to maintain deniability (A-11). No substantive reason exists for this Court to adjust the particular balance struck by the Minnesota Supreme Court, because that would not change the result below. *Cf. International Longshoremen's Ass'n v. Davis*, 476 U.S. 380, 398 (1986) (court does not "review federal issues that can have no effect on the state court's judgment").

C. Petitioner Has Not Shown a Need to Further a State Interest of the Highest Order by Punishing These Truthful Publications of Matters of Public Significance.

Of course, even though the Minnesota Supreme Court struck a balance in favor of respondent newspapers below, Star Tribune recognizes that a case-by-case balancing approach has its weaknesses. Commentators have criticized such a balancing test as affording too little protection to the First Amendment interests involved in particular disputes, as being subject to manipulation to reach predetermined conclusions, and as producing unpredictable results and uncertain expectations. *E.g.*, L. Tribe, *American Constitutional Law* 791-94 (2d ed. 1988); T. Emerson, *The System of Freedom of Expression* 717-18 (1970); Frantz, *The First Amendment in the Balance*, 71 Yale L.J. 1424 (1962). This Court refuses to strike a case-by-case balance in defamation cases. *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 343-44 (1974) ("Because an ad hoc resolution of the competing interests at stake in each particular case is not feasible, we must lay down broad rules of general application.").

Even if this Court decides that there is a need for a broad rule of general application, however, it is not necessary to fashion a general rule to cover the enforceability of promises extended by the press in any and all circumstances. Rather, that rule can be guided by the circumstances of the present case, which arises from the disclosure of the identity of a confidential source who engaged in political campaign activities, and who suffered damages from the publication of truthful information about matters of public significance.[6]

---

[6] In some situations, the interest served by disclosing the source's identity may have nothing to do with journalistic judgment but clearly would be sufficient to justify voluntary disclosure by the journalists. *E.g.*, R. 743-44 (if confidential source revealed he had

Nor does such a general rule need to reject the applicability of promissory estoppel to these situations. The promissory estoppel approach of the Minnesota Supreme Court provides

---

put botulism in public drinking water supply); *id.* at 1225-26 (if a confidential source were about to commit murder). In others, the interests asserted by the source or the nature of the alleged agreement itself might require constitutionally impermissible levels of judicial intrusion upon the editorial process, such as the alleged contract in *Strick v. Superior Court*, 143 Cal. App. 3rd 916, 919 n.1, 925 n.5, 192 Cal. Rptr. 314, 315 n.1, 320 n.5 (1983) (alleging breach of oral contract to "portray [plaintiffs] in a favorable light to the readers" if plaintiffs would talk to reporter).

In other situations, a source might assert interests different from those asserted by petitioner in this case (see pp. 32-40 below). This may strengthen or weaken the claim for state protection of that interest. For example, a celebrity might seek to enforce an agreement to share royalties from an authorized or exclusive account of his or her activities. Confidentiality might protect human life for informants on organized crime or totalitarian foreign governments. Those circumstances present a stronger case for state protection of the underlying interests. On the other hand, some "promises" between journalists and sources may be made in jest, or border so much on the frivolous that they do not warrant judicial enforcement. *E.g.*, Allman, *Noriega's Dark Victory*, Vanity Fair, Feb. 1990 at 114, 117 ("The condition of this interview is that you mention [my pet Dalmation] Dudley in *Vanity Fair*.").

Some journalists contend that they ethically may breach a promise of confidentiality to a source (1) when the newsworthiness of the identity of the source is at least as important as the basic information conveyed in the story (R. 1314); (2) when disclosure is required to correct public misstatements made by the source (A-7 n.4); (3) when a court has ordered disclosure of the source (*id.*); (4) where the source has passed along false information in a smear campaign, Smyser, *There are Sources and Then There are "Sourcerers,"* 5 Soc. Resp.: Journalism L. Med. 13, 17-18 (1979); or (5) when the source has died, Langley & Levine, *Broken Promises*, Columbia Journalism Review 21, July/August 1988.

In still other situations, the fact and scope of the purported agreement may be disputed. Star Tribune's Brief to the Minnesota Court of Appeals describes several examples of such situations at pages 23-24. This, of course, does not exhaust the universe of possibilities.

a useful screening mechanism. No promise is binding under promissory estoppel unless "injustice can be avoided only by enforcing the promise" (A-10); actions based on frivolous promises could be dismissed quickly and easily. Also, because the doctrine of promissory estoppel requires an unambiguous promise (A-10-11), the Minnesota Supreme Court decision implicitly incorporates as a matter of state law the requirement which a federal judge, working under the constraints of the opinion of the Minnesota Court of Appeals, imposed as a matter of constitutional law. *Ruzicka v. Conde Nast Publications, Inc.*, 733 F.Supp. 1289, 1300 (D. Minn. 1990) ("at a minimum, the Constitution requires plaintiffs in contract actions to enforce a reporter-source agreement to prove specific, unambiguous terms and to provide clear and convincing proof that the agreement was breached"), *appeal pending* (argued February 11, 1991). Furthermore, the doctrine of promissory estoppel, noteworthy for its "flexibility" (A-10), can accommodate within its balancing whatever general rule and increased weight for some factors which this Court finds necessary under the First Amendment.

(1) These Publications Consist of Truthful Information about Matters of Public Significance.

There is no claim in this case that the publications at issue contain any false statement of fact. The publications consist entirely of truthful information.

Nor is there any real question that descriptions of activities in political campaigns are matters of public significance. The Minnesota Supreme Court characterized this as "the quintessential public debate in our democratic society" (A-13), echoing pronouncements of this Court. *E.g.*, *Harte-Hanks Communications, Inc. v. Connaughton*, 491 U.S. 657, ——, 57

U.S.L.W. 4846, 4854 ("Vigorous reportage of political campaigns is necessary for the optimal functioning of democratic institutions and critical to our history of individual liberty."); *Monitor Patriot Co. v. Roy*, 401 U.S. 265, 272 (1971) ("it can hardly be doubted that the constitutional guarantee has its fullest and most urgent application precisely to the conduct of campaigns for political office").

Petitioner may argue that it was not newsworthy to publish his name or the name of his employer, or that publication of these details lacks "public significance." *Cf.* Petitioner's Brief at 29. This Court, however, repeatedly has made clear that determination of "a matter of public significance" does not depend upon such fine parsing of the published words, but rather whether "the article generally, as opposed to the specific identity contained within it, involved a matter of paramount public import," *The Florida Star v. B.J.F.*, 491 U.S. 524, ——, 57 U.S.L.W. 4816, 4819 (1989) (article identifying victim of robbery and rape; matter of public significance was "the commission, and investigation, of a violent crime which had been reported to authorities"). *Accord, Smith v. Daily Mail Publishing Co.*, 443 U.S. 97 (1979) (article identifying juvenile alleged to have committed murder); *Landmark Communications, Inc. v. Virginia*, 435 U.S. 829 (1978) (article identifying judges whose conduct was being investigated); *Oklahoma Publishing Co. v. District Court*, 430 U.S. 308 (1977) (article and photograph identifying juvenile alleged to have committed murder); *Cox Broadcasting Corp. v. Cohn*, 420 U.S. 469, 492 (1975) (article identifying victim of rape-murder).

Therefore, the publications at issue here consisted entirely of truthful information about matters of public significance.

(2) Petitioner's Interests in Confidentiality, in the Circumstances of this Case, Are Not "of the Highest Order."

This Court long has recognized that the First Amendment provides particularly strong protections, and perhaps even absolute protection, to truthful publications about matters of public significance. In *Garrison v. Louisiana*, 379 U.S. 64 (1964), this Court stressed that

> where the criticism is of public officials and their conduct of public business, the interest in private reputation is overborne by the larger public interest, secured by the Constitution, in the dissemination of truth. . . . Truth may not be the subject of either civil or criminal sanctions where discussion of public affairs is concerned. (*Id.* at 72-73, 74.)

This Court's decisions "demonstrate that state action to punish the publication of truthful information seldom can satisfy conditional standards." *Smith v. Daily Mail Publishing Co.*, 442 U.S. 97, 102 (1979). At the very least, where a person "lawfully obtains truthful information about a matter of public significance then state officials may not constitutionally punish publication of the information, absent a need to further a state interest of the highest order." *Butterworth v. Smith*, 494 U.S. ——, ——, 58 U.S.L.W. 4363, 4365 (1990); *The Florida Star v. B.J.F.*, 491 U.S. at ——, 57 U.S.L.W. at 4818; *Daily Mail*, 443 U.S. at 103. The constitutionally proscribed state punishments include civil damage awards such as those in this case and in *Florida Star*. This principle precludes any recovery by petitioner against the newspapers under the circumstances of this case.

Because this case clearly involves the publication of truthful information about a matter of public significance, the critical question is whether petitioner has shown that his recovery of

civil damages through Minnesota law of promissory estoppel is necessary to further a state interest of the highest order.[7]

[7] Petitioner mistakenly asserts that the *Florida Star* standard does not apply because "information obtained through violated promises of confidentiality is not lawfully obtained." Petitioner's Brief at 26. Judge Crippen, the only judge in the courts below who discussed this contention, squarely rejected it (A-59) (Minn. Ct. App.; Crippen, J., dissenting). Furthermore, in this case, as recognized by both the Minnesota Supreme Court (A-4) and the Minnesota Court of Appeals (A-24), other sources had independently identified Cohen as the person responsible for releasing the Johnson material.

It would be an extreme and unwarranted step to hold that breaking a promise to a source—which is not a legally binding contract under state law (A-7-10)—renders the acquisition of information "unlawful" for purposes of the *Florida Star* standard. Although this Court has not defined the conduct which will render information "not lawfully acquired," it seems to have had in mind circumstances amounting to outright theft. *Cf. Branzburg v. Hayes*, 408 U.S. 665, 691 (1972) (reporters not immune from criminal conviction for "stealing documents or private wiretapping"); *Time v. Hill*, 385 U.S. 374, 384 n.9 (1967) (intimating no view as to "whether the Constitution limits state power to sanction publication of matter obtained by an intrusion into a protected area, for example, through the use of electronic listening devices"). Past cases indicate that journalists who obtain information by violating, or whose sources have violated, statutes or rules against communication of the information itself have not acted unlawfully. *E.g., The Florida Star v. B.J.F.*, 491 U.S. at——, 57 U.S.L.W. at 4819 (police department provided information in violation of public records statute); *Landmark Communications, Inc. v. Virginia*, 435 U.S. 829, 832 (1978) (information about judicial commission proceeding apparently obtained from participant(s) whose disclosure of confidential information was a misdemeanor).

Even if the truthful information in this case had not been "lawfully obtained," petitioner is mistaken in his implicit assumption that publication of such truthful information is totally without First Amendment protection. This Court's decisions do not go that far. *See The Florida Star v. B.J.F.*, 491 U.S. at —— n.8, 57 U.S.L.W. at 4819 n.8 (Court has "no occasion to address" the issue of "whether, in cases where information has been acquired *unlawfully* [emphasis by the Court] by a newspaper or by a source, government may *ever* [emphasis added] punish not only the unlawful acquisition, but the ensuing publication as well"); *cf. Press-Enterprise Co. v. Superior Court*, 478 U.S. 1, 17 (1986) (Stevens, J., dissenting) ("right to publish or otherwise communicate information lawfully *or unlawfully* acquired" is one which "may be overcome only by a governmental objective of the highest order attainable in no less intrusive way") (emphasis added).

The "highest order" interest necessary to meet the *Florida Star - Daily Mail* standard can be no less than the level of interest necessary to justify a prior restraint. *Daily Mail*, 442 U.S. at 101-02.

Few asserted interests meet this high standard. In *Snepp v. United States*, 444 U.S. 507, 509 n.3 (1980), this Court recognized the federal government's "compelling interest in protecting both the secrecy of information important to our national security and the appearance of confidentiality so essential to the effective operation of our foreign intelligence service," and upheld a requirement that CIA agents submit accounts of their agency activities to the CIA for prepublication review. The Court did *not* hold that these interests justified total suppression of such accounts, however, and the Court has denied injunctive relief when the assertion of national security interests has not been accompanied by sufficient evidence of necessity to meet the burden of justifying a prior restraint. *New York Times Co. v. United States*, 403 U.S. 713 (1971). Even rights protected by other constitutional provisions, such as the Sixth Amendment's right to a fair trial, may be insufficiently compelling to justify particular restraints on truthful publications. *Nebraska Press Ass'n v. Stuart*, 427 U.S. 539, 561 (1976).

(a) The Minnesota Supreme Court Did Not Recognize a State Interest in Enforcing All Promises for Their Own Sake.

Petitioner initially argues that the courts should protect his interest in enforcing promises made to him. Petitioner's Brief at 17-20. He conveniently ignores the fact that the Minnesota Supreme Court placed no weight whatsoever on the enforcement of promises for their own sake. True, the Minnesota Court of Appeals, in analyzing petitioner's claim for breach of contract, had relied upon a state interest in enforcing contracts (A-31-35). However, the Minnesota Supreme Court eliminated the contract claim on other grounds. Its promissory estoppel analysis eschewed any reliance on any general and formalistic state interest in freedom of contract,[8] and

[8] Petitioner's Brief at 19 resurrects this interest in "protecting expectations based on promises." That interest, standing alone, does not justify restrictions on First Amendment rights. "Contract" and "expectations based on promises" are mere labels, entitled to no more deference from this Court than "tort law" in *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964), or "revenue raising" in *Minneapolis Star & Tribune Co. v. Minnesota Commissioner of Revenue*, 460 U.S. 575 (1983), or "preventing emotional harm" in *Hustler Magazine, Inc. v. Falwell*, 485 U.S. 46 (1988). Indeed, that abstract interest in protecting expectations is subject to numerous exceptions on grounds less significant than the First Amendment rights at stake here. *See* A-9.

Moreover, petitioner's call for broad judicial enforcement of promises between journalists and their sources carries considerable constitutional cost. Such promises, usually oral, are often vague and subject to misunderstanding. Problems of proof could convert almost every dispute between journalist and source into factual issues for trial. The cost of litigation alone could chill the exercise of First Amendment rights. *See Time, Inc. v. Hill*, 385 U.S. 374, 389 (1967). Additionally, a cause of action for breach of reporter-source agreements, unrestrained by any First Amendment considerations, could be subject to enormous abuse by government officials. Such officials often are confidential sources. *See* E. Abel, *Leaking: Who Does It? Who Benefits? At What Cost* (1987). Government officials should not be given such a broad license to enlist the courts to control press content and to dictate the scope of debate on public issues. *See New York Times Co. v. Sullivan*, 376 U.S. at 270-78.

instead directly balanced this particular source's interest in protecting anonymity against the rights of the press and public to communicate this particular information (A-13).

(b) Petitioner's Interest in Protecting His Reputation is not "of the Highest Order."

The Minnesota Supreme Court referred to a "common law interest in protecting a promise of anonymity" (A-13). However, it did not specify the source of this common law interest. It further acknowledged that "[a]nonymity gives the source deniability, but deniability, depending on the circumstances, may or may not deserve legal protection" (A-11). To the extent that the state interest protects petitioner's reputation from adverse publicity, it is indistinguishable from interests in anonymity asserted by juvenile criminal suspects or judges under investigation for alleged misconduct; those interests were found not sufficiently compelling to justify restraints in *Daily Mail, Oklahoma Publishing* and *Landmark Communications*. "[A]bsent exceptional circumstances, reputational interests alone cannot justify the proscription of truthful speech." *Butterworth v. Smith*, 58 U.S.L.W. at 4366.

Indeed, reputational interests have *never* prevailed over truthful, newsworthy publications in the context of defamation actions, where the First Amendment requires that plaintiffs establish *both* that the publication contained false facts about them *and* that the defendants acted with a degree of fault with respect to the truth or falsity of the statements.

Hustler Magazine, Inc. v. Falwell, 485 U.S. 46, 50 (1988).[9] This Court has applied the same dual requirements of fault and falsity to other legal theories, such as false-light invasion-of-privacy, *Cantrell v. Forest City Publishing Co.*, 419 U.S. 245 (1974); *Time, Inc. v. Hill*, 385 U.S. 374 (1967), and to intentional infliction of emotional distress, *Hustler Magazine*.

Petitioner's claims for misrepresentation and breach of contract in the lower courts amounted to little more than an attempt to dress a defamation claim in different garb and avoid the otherwise insurmountable obstacle of truth. He built his case for damages upon the loss of his job. Petitioner's employment with the Martin Williams Advertising Agency ended on the day the articles appeared disclosing his role in publicizing Johnson's misdemeanors. Cohen contends that he was fired (R. 201), although this was sharply disputed at trial (*see* R. 1500-1505, 1740-1743, 1763). His theory of damages is that the newspaper articles damaged his reputation and made him a controversial character that his employer had to fire, and that his own conduct had nothing to do with his employer's reaction (*see* R. 1787-88). If his causation argument is correct, then his damages are entirely reputational.

From opening statement to closing argument, petitioner's trial tactics underscored that his claim was for injury to reputation allegedly arising out of the publication of information. His injuries were characterized repeatedly as "ridicule" and "kick in the face" (R. 45), "great deal of grief and embarrassment" (R. 41), "a continual series of articles on Mr. Cohen" (R. 42), "the embarrassment and humiliation that he has suffered" (R. 66), an "assault on Mr. Cohen in the form of a cartoon" which was "a cross that Mr. Cohen is going to have

[9] The degree of fault varies with the status of the plaintiff. As a public figure (A-5 n.3), petitioner would have to establish actual malice on the part of the newspapers.

to bear for the rest of his life" (R. 1790), and "a cross that his wife and his two daughters are going to have to bear for the rest of their lives" (R. 1791), that Cohen "was humiliated" (R. 1794), an effort "to assassinate the character" of Cohen (R. 1799), and a "cloud hanging over Mr. Cohen's head" (R. 1804). Petitioner's counsel ended his closing statement with these words:

> Dan Cohen has been lied to, he's been humiliated, he and his family, his wife and two daughters have had their name blackened by the newspapers illegal conduct in this case. We ask you, members of the jury, to give justice to Dan Cohen and to restore him and his family, his wife and his two teenage daughters, his good name, so that we can throw this cartoon into oblivion where it belongs. (R. 1814.)

Cohen himself testified that he was "outraged" by disclosure of his "name in such a way as it cost me my job and my reputation" (R. 255). Another witness for Cohen testified that the incident "certainly didn't help [Cohen's] reputation within the ad community" (R. 1241).

These damage arguments are indistinguishable from the claims of injury to reputation, humiliation and embarrassment which give rise to most defamation actions. As this Court recognized in *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 350 (1974), the interests protected by state laws of defamation include "impairment of reputation and standing in the community, personal humiliation, and mental anguish and suffering." *See also Time, Inc. v. Firestone*, 424 U.S. 448, 460 (1976). Discharge from employment and denial of employment resulting from injurious publications are traditional forms of special damages in defamation actions. Restatement (2d) of Torts § 575, Comment b, at 198 (1977).

Any state interest in protecting individuals from these sorts of injury has never been enough to impose liability for damages caused by truthful publications under defamation law. Similarly insufficient to justify punishment of truthful publications are state interests in protecting individuals from "the mental distress from having been exposed to public view," *Time, Inc. v. Hill*, 385 U.S. 374, 384 n.9 (1967); *see also id.* at 388 ("risk of this exposure is an essential incident of life in a society which places a primary value on freedom of speech and of press"), or from "outrage, mental distress, shame and humiliation," *Cantrell v. Forest City Publishing Co.*, 419 U.S. 245, 248 (1974); *accord, Hustler Magazine, Inc.*

Truth always has defeated claims for these types of damages, and it should do so here. Petitioner cannot meet the first step in the dual *Gertz-Hustler Magazine* requirements of falsity and fault. He cannot establish any damages from a false statement of fact, and hence his claim must fail.

(c) Petitioner's Status as a Confidential Source Does Not Present a "Highest Order" Interest.

Petitioner cannot resurrect his claim by invoking a state interest in protecting the identity of confidential sources, as reflected in the Minnesota Free Flow of Information Act, Minn. Stat. § 595.021 *et seq.* (1990). *See* Petitioner's Brief at 27-29. That statute protects the news media and the public's interest in obtaining information, and not the individual interests of the source. Minn. Stat. § 595.022 (1990) ("In order to protect the public interest and the free flow of information, the news media should have the benefit of a substantial privilege not to reveal sources of information or to disclose unpublished information.").

Confidential sources often play an important role in the newsgathering process, but no jurisdiction has given their interests any independently enforceable legal recognition.[10] Confidential sources enjoy common law or statutory protection only in the context of privileges protecting reporters from compulsory testimony in some circumstances:

> However the [journalist's] privilege is applied, it appears to protect the communicator, not the source. Only the reporter may waive the privilege. Minnesota's *Cohen* case [prior to the decision of the Minnesota Supreme Court] alone suggests otherwise. Generally, a broken promise by a reporter raises an ethical question but provides no legal cause of action.

D. Gillmor & J. Barron, *Mass Communication Law: Cases and Comment* 394 (5th Ed. 1990). Claims of privilege under the First Amendment similarly protect the journalist, not the source. *See Branzburg v. Hayes*, 408 U.S. 665, 695 (1972) ("The privilege claimed is that of the reporter, not the informant"); *id.* at 737-38 (Stewart, J., dissenting) ("This protection does not exist for the purely private interests of the newsman or his informant. . . . Rather, it functions to insure nothing less than democratic decisionmaking through the free flow of information to the public.").

---

[10] This factor, among others, distinguishes Cohen's interests from the national security interests in protecting classified information which were the subject of the written employment agreement in *Snepp v. United States*, 444 U.S. 507 (1980), or the privacy interests of the prison inmate who protested being filmed in an "exercise cage" in *Huskey v. National Broadcasting Co.*, 632 F. Supp. 1282 (N.D. Ill. 1986). Nor does this case involve the government's interest in setting conditions on the use of information which the government itself has extracted from an unwilling source, as in *Seattle Times Company v. Rhinehart*, 467 U.S. 20 (1984).

By protecting the listener rather than the speaker in the privileged communication, the journalist's privilege differs from other privileges such as attorney-client, physician-patient, clergy-penitent and marital partners. The few reported cases addressing the issue hold that sources cannot "waive" the privilege and compel unwilling reporters to testify, *United States v. Cuthbertson*, 630 F.2d 139, 147 (3rd Cir. 1980), *cert. denied*, 449 U.S. 1126 (1981); *Palandjian v. Pahlavi*, 103 F.R.D 410, 413 (D.D.C. 1984); *Los Angeles Memorial Coliseum Commission v. National Football League*, 89 F.R.D. 489, 494 (C.D. Cal. 1981); *State v. Boiardo*, 416 A.2d 793, 798 (N.J. 1980), and that sources cannot invoke the privilege to prevent a journalist from testifying if the journalist so chooses, *Small v. UPI*, 1989 U.S. Dist. Lexis 12459 at *3 (S.D.N.Y. 1989) (Roberts, Mag.). Courts in Minnesota have refused to allow witnesses to invoke the statutory privilege to avoid answering questions about their own possible role as sources. *Stuart W. Jamieson v. John Doe and Mary Roe*, Nos. CX-89-406 and CI-89-407 (Minn. Ct. App. March 21, 1989) (reproduced as pages 562-73 of the Joint Appendix to the Minnesota Supreme Court).

Jamieson demonstrates that Minnesota courts will not intervene to protect directly the interests of confidential sources in "anonymity and deniability" even when they clearly have the discretion to do so. This suggests that the State has made no commitment to protect this asserted individual interest of the source (as contrasted with the interests of the public and of the press). "When a State attempts the extraordinary measure of punishing truthful publication in the name of privacy, it must demonstrate its commitment to advancing this interest by applying its prohibition even-handedly, to the small-time disseminator as well as the media giant." *The Florida Star v. B.J.F.*, 491 U.S. at ——, 57 U.S.L.W. at 4820. Courts cannot

credibly assert that the interests of confidential sources are "of the highest order" for purposes of permitting damages awards against news organizations which publish truthful newsworthy information, when neither courts nor legislatures have chosen to protect such sources directly by excusing them from compelled testimony to identify themselves.[11]

Cohen's interest in the present case is even less significant than that of many other confidential sources, because he "willingly entered" the public debate on the 1982 gubernatorial campaign, "albeit hoping to do so on his own terms" (A-13). No journalist asked or persuaded him to divulge information.

---

[11] Dissenting Minnesota Supreme Court Justices Yetka and Kelley complained that the decision below gave the press a special immunity that other corporate or private citizens did not have (A-14-18). Petitioner's Brief sounds the same theme at pages 22-24. In part, their quarrel is with the First Amendment and its extension of special protections to free expression. Even apart from this constitutional consideration, petitioner's criticism proceeds from a mistaken assumption. Courts and legislatures have not shown any inclination to recognize a broad cause of action for broken promises of confidentiality apart from such clearly distinguishable contexts as doctors and lawyers; even in these special contexts, the law sometimes permits or even compels the disclosure of confidential information. *E.g.*, Minnesota Rules of Professional Conduct for Lawyers 1.6(b) (1990); Minn. Stat. § 626.52 (1990) (reporting of suspicious wounds); Minn. Stat. § 626.556 (1990) (reporting of maltreatment of minors); *see Penguin Books USA Inc. v. Walsh*, 1991 U.S. Dist. Lexis 962 (S.D.N.Y. 1991). Furthermore, broken "promises not to tell" are far more likely in the contexts of office conversations, backyard gossip and marital communications than they are in reporter-source relationships, yet reports of lawsuits in these non-media contexts are rare, if they exist at all. The trial court judgment against the newspapers below, like the Florida statute at issue in *Florida Star*, had "every appearance of a prohibition that society is prepared to impose upon the press but not upon itself. Such a prohibition does not protect an interest 'of the highest order.'" *The Florida Star v. B.J.F.*, 491 U.S. at ——, 57 U.S.L.W. at 4821 (Scalia, J., concurring).

He and four other experienced and sophisticated political operatives devised "a political scheme to broadcast a political attack but at the same time to evade responsibility for the act" and "assembled the ingredients for an editorial predicament" (A-54) (Minn. Ct. App.; Crippen, J., dissenting). Cohen attempted to manipulate public opinion through selective disclosures of information. Such efforts do not merit court enforcement. Cohen's desires do not constitute a "highest order" interest (A-55) (Minn. Ct. App.; Crippen, J., dissenting); *see also Press-Enterprise Co. v. Superior Court*, 478 U.S. 1, 19 (1986) (Stevens, J., dissenting) ("Neither our elected nor our appointed representatives may abridge the free flow of information simply to protect their own activities from public scrutiny."); *cf.* Posner, *The Right of Privacy*, 12 Ga. L. Rev. 393, 400, 419 (1978); Epstein, *Privacy, Property Rights and Misrepresentation*, 12 Ga. L. Rev. 455, 470, 473-74 (1978).

Finally, the Minnesota Supreme Court found that it was unnecessary to further a state interest in protecting the expectations of confidential sources by allowing petitioner's claims against the newspapers on the facts of this case. This Court should not assign more weight to the purported state interest than it received from the state itself. Under the circumstances of this case, protecting petitioner's desire for anonymity is not a state interest of the highest order.

CONCLUSION

For the foregoing reasons, this Court should dismiss the writ of certiorari. If it reaches the merits of the issue presented, this Court should affirm Part III of the decision of the Minnesota Supreme Court.

Respectfully submitted this 21st day of February, 1991,

JOHN D. FRENCH
JAMES FITZMAURICE
JOHN BORGER*
Faegre & Benson
2200 Norwest Center
90 South Seventh Street
Minneapolis, MN 55402
(612) 336-3000
Attorneys for Respondent Cowles Media Company
*Counsel of Record

OF COUNSEL:
RANDY M. LEBEDOFF
Cowles Media Company
425 Portland Avenue
Minneapolis, MN 55488
(612) 673-4600